United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7696

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

KURT SCHMIEDER,

Plaintiff-Appellant,

against

LOUIS H. HALL, JR., as Executor of the Estate of HELEN B. DWYER,

Defendant-Appellee.

P/S

BRIEF OF DEFENDANT-APPELLEE

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Preliminary Statement

This action involves three consolidated appeals by plaintiff Kurt Schmieder from orders of the United States District Court for the Southern District of New York. In view of the unique procedural history of this case, we will set forth in detail the factual background of each of these appeals.

1. On May 16, 1969, plaintiff Kurt Schmieder, a citizen of the Federal Republic of West Germany, commenced this action against the late Mrs. Dwyer claiming she had a "moral obligation" to give to plaintiff certain cash and securities which he claimed he gave to her as a gift, "impregnable at law", when he was a citizen and resident of

Nazi Germany in 1938 and she was a citizen and resident of the United States of America (A. 7a-9a).*

Following a non-jury trial held on June 30 and July 1, 1975, the Honorable Whitman Knapp filed an opinion and order dismissing plaintiff's complaint on the ground that plaintiff had failed to sustain his burden of proof and, alternatively, that plaintiff lacked standing to sue because any interest plaintiff had in the subject property was cut off in 1948 when all of his property was vested by the Alien Property Custodian pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 1, et seq. In his opinion Judge Knapp specifically rejected plaintiff's testimony that prior to the time the gift was made, plaintiff had reached a gentlemen's agreement with Mrs. Dwyer's employer, Louis Hall, Sr.,** that the gift property would be returned to him at some future time. Judge Knapp found, therefore, that the plaintiff had failed to establish any basis for a constructive trust with regard to the property Mrs. Dwyer received as an absolute gift in 1938 (A. 876a-898a). Judgment in accordance with Judge Knapp's opinion was entered on October 6, 1975 (A. 899a).

Subsequent to the entry of judgment plaintiff filed a timely motion for a new trial claiming the Court had not understood his basic contention. He asserted that he did not claim a constructive trust arose in 1938 when Mrs. Dwyer received the property, but rather, in 1969 when he sued for its return (A. 902a-916a). By order entered on October 31, 1975, Judge Knapp denied this motion, erroneously stating it was untimely, but finding also that it was without merit (A. 917a). Thereafter plaintiff again moved for a new trial, pointing out the Court's error in stating his original motion was untimely, and again arguing the

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* References in the form "A." are to the Joint Appendix and those in the form "E." are to the Exhibit Volume.

** Defendant-Appellee Louis H. Hall, Jr., the Executor of Mrs. Dwyer's Estate, is the son of Mr. Hall, Sr.

merits of his claim. In an order filed on November 14, 1975, Judge Knapp acknowledged he had been in error in stating plaintiff's original new trial motion was untimely, but reiterated his conclusion that the motion was wholly without merit (A. 926a). On December 12, 1975, plaintiff filed a notice of appeal from the judgment dismissing his complaint and the denial of his new trial motions.

2. On December 3, 1975, plaintiff filed a motion for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, claiming there had been a mistake by plaintiff's counsel in understanding the issues to be tried. Counsel alleged he had been led to believe plaintiff would have a right to recover, even if there had been no fraud committed in 1938 at the time he made the gift. Counsel reiterated his belief that the claim arose simply from the fact Mrs. Dwyer did not return the property to plaintiff when he requested it in 1967 (A. 927a-934a). Plaintiff also stated he was prepared to bring a new action based on a claim of equitable fraud arising from Mrs. Dwyer's retention of the gift property after his request for its return in 1967 (A. 927a-934a). By order filed December 11, 1975, Judge Knapp denied the motion, stating that principles of *res judicata* would bar the proposed new complaint (A. 993a). Plaintiff then moved for reargument of the December 3, 1975 new trial motion, attaching to his motion papers a proposed new complaint (A. 995a-1015a). In an order filed December 22, 1975, Judge Knapp stated that he viewed the filing of plaintiff's original notice of appeal as divesting him of jurisdiction to rule on this new trial motion. Judge Knapp added that no purpose would be served in seeking a remand because his prior opinions indicated the proposed new complaint would be barred by *res judicata*. Judge Knapp suggested that if plaintiff wished to file his new complaint, the Court would dismiss it on *res judicata* grounds, and plaintiff could appeal that decision (A. 1016a-1017a). Plaintiff then filed a notice of appeal from the denial of the December 3, 1975 motion.

3. Adopting Judge Knapp's suggestion, plaintiff filed his new complaint, again claiming a right to recover the property given to Mrs. Dwyer in 1938. The complaint acknowledged plaintiff had been told at the time that the gift would have to be "absolute, irrevocable and without imposition of any duty on the donee" (A. 1019a-1028a). Predictably, on March 17, 1976, Judge Knapp granted defendant's motion to dismiss the second action on grounds of *res judicata* (A. 1078a-1082a). Undeterred, prior to entry of judgment in accordance with Judge Knapp's opinion, plaintiff moved for leave to file a new amended complaint, for summary judgment on his behalf and, alternatively, for the entry of judgment on Judge Knapp's opinion awarding summary judgment to the defendant (A. 1083a-1084a). On May 5, 1976, Judge Wyatt, acting in Judge Knapp's absence as a result of illness, entered an order denying plaintiff's motion except insofar as it requested entry of a judgment for defendant in accordance with Judge Knapp's earlier opinion. A third notice of appeal was then filed (A. 1128a).

Statement of the Case

Introduction

The basic appeal in this case is from a finding by the trial judge in a non-jury case that the plaintiff had failed to meet his burden of proof. Judge Knapp, in a detailed opinion, set forth the reasons why he rejected plaintiff's claim that a fraud had been perpetrated on him by Louis H. Hall, Sr. and Helen Dwyer. First, Judge Knapp rejected plaintiff's own testimony, which provided the sole factual basis for his claim, noting that, by his own admission, plaintiff had knowingly and willfully evaded legitimate taxes imposed by the Weimar Republic in the early 1930s, and that plaintiff's present contention was directly contrary to a sworn statement he signed in 1948. In addition, the Court carefully analyzed all of the facts and con-

cluded "that singly or in combination they do not establish that in 1938 Mrs. Dwyer and Louis Hall, Sr. embarked upon and consummated a conspiracy to defraud Schmieder" (A. 890a, 894a).

Judge Knapp's opinion contains a detailed statement of the relevant facts which ordinarily would require no further elaboration. But, despite a contrary factual finding by the district judge, plaintiff continues to make charges of fraud against Louis Hall, Sr., a respected member of the bar, who, until the institution of this lawsuit 20 years after his death, never had his integrity questioned. In these circumstances, we feel it appropriate to set forth the facts in more detail than did Judge Knapp because those facts amply demonstrate he was correct in his conclusion that Mr. Hall, Sr. and Mrs. Dwyer never attempted to defraud plaintiff.*

A. Schmieder Creates a "Hot Money" Account

During World War I, a knitting mill in the United States owned by Schmieder's family was seized by the United States Alien Property office. In 1928, Schmieder recovered 80% of the value of the property, an amount of approximately $250,000, which he invested in securities in the United States. In the early 1930s, Schmieder divided his property into two funds; the larger of the funds Schmieder characterized as "hot money" (A. 56a).

According to Schmieder, even before the Nazis came to power, he reported only the existence of the smaller fund to the German tax authorities. The "hot money" he placed in an account at the New York Trust Company in the name

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* By the time of the trial all of the principal people involved in the transaction at issue, except Schmieder, had died. Testimony and affidavits of those individuals were available, however, because the property at issue had been the subject of extensive proceedings in the 1940s, when the property was blocked by the Treasury Department and then seized by the Alien Property Custodian.

of his sister-in-law, Jenny Bochmann. After the Nazi regime came to power in 1934, Schmieder continued to report only the amounts in the smaller fund to the German Government (A. 56a, 85a, 214a, 217a).

In 1935, Louis Hall, Sr., a New York attorney who was travelling in Europe, was introduced to plaintiff Schmieder by William Graupner, a client of Mr. Hall who had a house in Germany. Schmieder asked Hall, Sr. some questions concerning the use of corporations to hold securities in the United States. After his return to the United States, Hall received a letter from Mrs. Bochmann instructing him to set up a corporation to hold the securities then in her name at the New York Trust Company. As a result of these instructions, Stoneleigh Corporation was formed, and the securities held in Mrs. Bochmann's name at the New York Trust Company were transferred to Stoneleigh Corporation (E. 19).

B. Mrs. Bochmann's Withdrawal as Nominee for the "Hot Money"

In 1936 Mrs. Bochmann, who had a son living in Germany, told Schmieder she would no longer act as his nominee for his assets in the United States. In the fall of 1936, Schmieder discussed this matter with his friend William Graupner, who was then in Germany. Schmieder told Graupner he had a problem because he had never reported his interest in these funds to the German Government. Schmieder asked Graupner to discuss this matter with Mr. Hall, Sr. when he returned to the United States. Graupner did discuss the matter of Mrs. Bochmann's interest in Stoneleigh Corporation with Hall, Sr., who said the only thing to be done was "to take the property back. There is no way I can suggest whereby she can retain ownership and conceal the fact of her ownership . . . if they wanted to give it away and make it an absolute gift, that they could always do" (A. 23a, 89a; E. 30-31, 55, 110, 112).

Graupner testified he travelled to Germany in the spring of 1937 and told Schmieder:

> "That the only way they can dispose of the property is to give it away. Schmieder naturally felt depressed and he told me that he had hoped there would be a more favorable possibility, but that he would think about it and give me an answer in the fall before I left . . . for home."

* * *

"Q. Well then, what happened after Mr. Schmieder had said he would think about it? A. Nothing happened until the fall when I returned here, and then Schmieder told me about his difficulties over there with the bank where he had been called to make a report.

Q. Make a report about what? A. Well, whatever questions they put.

Q. Yes. A. I think there were new questionnaires every week at that time. I don't know. Anyway, he told me about those things and he said he had thought about this situation.

Q. Yes. A. And if it was the only way, to give away this property.

Q. Yes. A. He would do so and I should tell Mr. Hall about it. You see, he was over in Germany and in a very difficult situation.

Q. Yes. A. Because at that time I think the government or one of the government official had said that they would see heads roll unless they reported and handed in their foreign holdings. So Schmieder must have been scared sufficiently at that time to come to this decision.

Q. What else did he tell you when he told you about his final decision? What did he exactly tell you as far as you remember? A. Oh, that I really can't say. I had of course explained to Schmieder very clearly that Mr. Hall had emphasized that a gift must be of his

> own free will, absolute, and no strings attached to it; I think something like that. Those were the words in which I told Schmieder, and I told him also, if I remember correctly at that time that Mr. Hall wouldn't do anything but that the law prescribed in gifts of that kind; something like that. I think I spoke about Mr. Hall being connected with an old firm and so forth. Anyway he was satisfied to go ahead with the gift and I so reported to Mr. Hall." (E. 115-117)

At the time Schmieder told Graupner that he had decided to solve his problems by making a gift. Graupner said to him:

> "Now Schmieder, you part with a good deal of your family fortune. What is there I can show to your family in case they complain to me afterwards."

Schmieder then gave Graupner a slip of paper stating in German and in English:

> "I am in agreement with the discussed arrangements for my sister-in-law." (E. 129-130)

This document was ultimately delivered to Mr. Hall, Sr., with a covering letter dated June 11, 1947, from Graupner which stated:

> "The arrangements which we had discussed, and to which we referred in this note, were those for making an absolute gift by Mrs. Bochmann after I had informed him that that was the only basis on which you could act in the transaction." (E. 195)

C. The Choice of a Donee

Schmieder left it to Graupner and Hall, Sr. to select a recipient for the gift. Mr. Hall first suggested that a gift be made to Mr. Graupner's son, but Mr. Graupner said no.

Graupner then suggested Mr. Hall's son, but this suggestion was rejected. Finally, Mr. Hall suggested Helen Dwyer because, as Graupner recalled, "she had been there a long time and she was deserving if there was any such windfall or something like that" (E. 121, 131).

The facts of Helen Dwyer's prior life clearly supported Mr. Hall, Sr.'s judgment that she was a person who deserved a windfall. Helen Dwyer, who had been orphaned when she was three years old, had worked to support herself from the time she graduated from high school in 1913. In 1918 she married a man who was in the Navy. In 1922 her husband was committed to a mental hospital, where he remained until his death in 1938. At the time Mrs. Dwyer received the gift, she herself was not in good health (A. 409a-410a; E. 66, 206, 247).

At the time the gift was made to Mrs. Dwyer, Mr. Hall told her it was an absolute gift with no strings attached (E. 31, 43). This fact was confirmed to Mrs. Dwyer in a letter of March 15, 1938 from Mrs. Bochman, which stated:

> "I am the owner of the outstanding stock of Stoneleigh Corporation, a corporation organized under the laws of Delaware, consisting of 500 shares. Stoneleigh Corporation is also indebted to me in the total amount of $23,294.45 for cash advanced by me to it. I wish to make an absolute gift to you of both my stock in the said corporation and of my claims for advances against it, subject, however, to the payment by you of all taxes which may properly be chargeable to me under the laws of the United States of America, such as gift taxes or otherwise." (A. 645a)

D. After the Gift is Made Schmieder First Talks to Hall, Sr. About It

Graupner and Schmieder both testified that the discussions concerning the problem of Mr. Schmieder's "hot money" occurred in Germany, and that Graupner relayed

the instructions from Schmieder to Mr. Hall, Sr. It is clear from Schmieder's own testimony, however, that he never discussed the matter personally with Mr. Hall, Sr. until after the gift was actually made. Mr. Hall, Sr.'s passports established that after his trip to Europe in the spring of 1935, Hall, Sr. did not return again until March of 1939, the year after the gift was made (A. 61a, 411a).

E. Mrs. Dwyer's Use of the Funds and The Vesting by the Alien Property Custodian

Throughout her life Mrs. Dwyer insisted in sworn statements and in private correspondence with her attorneys that she had been assured there were no strings attached to the gift she received, that she considered the property to be her own to do with as she pleased, and that she had no agreement to reconvey the property to anyone.

In 1941 the Treasury Department issued regulations requiring the registration of all property held by United States citizens for foreign nationals. In view of the unusual nature of the gift she had received, Mrs. Dwyer, acting on the advice of Hall, Sr., consulted George Z. Medalie, Esq., concerning the reporting of the gift property. Acting on his advice, she reported the unconditional gift of the property to the Treasury Department. On June 30, 1943, her accounts containing the gift property were blocked by the Government and ultimately in December, 1948, the Alien Property Custodian seized the property.* Thereafter Mrs. Dwyer commenced an action for the return of the property, stating she had received it as an absolute gift (E. 34-35, 69-70, E. 203-209).

One of the items of evidence used to support Mrs. Dwyer's claim was the following sworn statement which

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* Between June, 1943 and December, 1948, Mrs. Dwyer filed nineteen applications for licenses to use some of the funds.

plaintiff Schmieder had given to a friend of Graupner's in June, 1948.

"Solemn Attestation:

The undersigned confirms herewith that it is understood by him that the gift of Mrs. Bochman's bank balance with the New York Trust Company and of securities deposited there to Mrs. Dwyer is a voluntary, absolute and irrevocable gift, without any obligation of Mrs. Dwyer.

(Signed) Kurt Schmieder

Meerane (Sachsen)
June 1, 1948
As witness: Dr. Alfred Lindner" (E. 220)

In 1951 Mrs. Dwyer's action for the return of the property was settled by the Alien Property Custodian, and 55% of the property was returned to her (E. 15-18).

Throughout the proceedings relating to the vesting of the gift property, Mrs. Dwyer consistently testified, as did Hall, Sr. and Graupner, that she received the property as an absolute gift with no strings attached. Thus, on August 4, 1943, Mrs. Dwyer testified before the Treasury Department as follows:

"Mr. Skidmore: Will you state what you have done with the income which you have collected from the securities which formed a part of this gift?

Mrs. Dwyer: I have used part of it for living expenses, for anything I want to purchase for myself. I have invested some and, of course, I have paid the interest on my loans to the New York Trust Company which is quite a considerable amount and my income taxes have been paid.

Mr. Skidmore: Have you paid any part of the income to anybody?

Mrs. Dwyer: No one. No one has benefited by it except me, myself.

Mr. Skidmore: Have you promised or agreed to make any payments?

Mrs. Dwyer: No, I have made no agreement." (E. 77-78)

Even more revealing than Mrs. Dwyer's sworn statements concerning the gift are the statements she made in private correspondence with her attorneys, which clearly indicated she viewed the property as her own. Most revealing in this regard is a letter to Mr. Landa, one of her Washington lawyers, of October 28, 1948:

"Dear Mr. Landa:

Referring to your comments on possible vesting, and the allowance of living expenses to me and funds for attorney fees, etc., if vesting is actually made I wish some provision could be made so that the property could still be under my direction as much as it is under my general license, particularly as to changes in investments because I am convinced that it will depreciate no end if left to the management of the APC personnel. . . . There never were any strings attached to this gift when offered to me, express or otherwise, that I should do anything with this property other than exactly as I wanted to." (E. 151)

F. Mrs. Dwyer's Testamentary Disposition of the Property

At the time of her death, Mrs. Dwyer left a will which, after making certain specific bequests to distant relatives and friends, left the bulk of her estate to the three children of her former employer, Louis Hall, Sr. Mrs. Dwyer's correspondence and her statements to friends indicate this disposition resulted from a combination of an affection she developed over a period of years for Mr. Hall and his family, and a sense of gratitude to him for suggesting her as the donee of the gift. Thus, in sending

a copy of her will to Mr. Landa, Mrs. Dwyer wrote on October 28, 1948:

> "I would like to point out that I am and always have been deeply appreciative of all benefits I have derived from my association as Mr. Hall's secretary and have felt that with the exception of limited family responsibilities I wanted my property to go to certain descendants of his. And I certainly feel very keenly since I received the gift in question that I wanted most of my property to go to such descendants of Mr. Hall's. The expression of such feeling has been the general tenor of my various wills." (E 153)

A similar expression of Mrs. Dwyer's feeling of affection for the Hall family is found in Mrs. Dwyer's letter to Louis Hall, Jr. on August 26, 1966, in which she stated:

> "Knowing and being associated with you and the Hall family has meant so much to me over the years and I thank you for all you have done for me." (E. 249)

Mrs. Dwyer's affection for the Hall family was also attested to by her friend, Mrs. Nugent, who testified:

> "Q. During the course of these dinners, did she ever speak of Mr. Hall and any of his family?
>
> A. Yes. She was very close to Mr. Hall's family. I don't think that anyone I knew of was as close to her as the entire Hall family." (A. 517a)

POINT I

The court below correctly determined that plaintiff failed to meet his burden of proof.

Plaintiff-appellant argues in his brief that he is entitled to recover the gift property because he alleges he was the victim of "a conspiracy to defraud embarked upon by Hall, Sr. and Dwyer" (Appellant's Br. p. 20). In making

this argument, plaintiff blithely ignores the factual finding of the trial judge that there was no such conspiracy (A. 876a-877a, 890a). Since plaintiff does not pause over the fact the trial judge rejected his claim of fraud as a matter of fact, he obviously offers no reason why this Court should overturn that factual finding as "clearly erroneous". *Lassiter* v. *Fleming*, 473 F.2d 1374 (2d Cir. 1973); see, *Allen & Co.* v. *Occidental Petroleum Corp.*, 519 F.2d 788 (2d Cir. 1975).

Judge Knapp's detailed opinion demonstrates there is no conceivable basis for overturning his factual conclusion that plaintiff failed to sustain his burden of proof. Judge Knapp's careful review of the evidence starts with a recognition that plaintiff's claim rests solely on his own uncorroborated testimony, which was contradicted by the sworn statements of every other participant in the transaction at issue. In addition, Judge Knapp found plaintiff's testimony could not be credited because (1) by his own admission he had knowingly and willfully devised a scheme to evade legitimate property taxes imposed by the Weimar Republic in the early 1930's, and (2) plaintiff's assertion the gift was subject to a "gentlemen's agreement" that it would ultimately be returned to him was contradicted by a sworn statement he signed in 1948 (A. 891a). Judge Knapp carefully reviewed the probabilities of the situation and concluded that in 1938 plaintiff, who feared the death penalty if his tax evasion scheme was uncovered, decided to make an absolute gift of his property in the United States rather than risk having his interest in this property discovered by the Nazi authorities (A. 892a).* Judge Knapp also noted that it was improbable that Hall, Sr., a respected member of the bar, and Mrs. Dwyer would have undertaken to play fast and loose with their own

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* Judge Knapp properly noted that plaintiff's claim must be viewed in the perspective of the world situation in 1938. At that time a resident of Germany would have little reason to believe the Nazis would ultimately be driven from power (A. 892a).

government in order to help Schmeider, who was practically a stranger to Hall, Sr. and a total stranger to Dwyer (A. 892a).

There is, therefore, no basis for overturning Judge Knapp's determination that plaintiff failed to meet his burden of proof. In this regard, it is important to note that Judge Knapp reached his conclusion applying the normal civil standards (A. 891a). However, in order to establish the constructive trust alleged in the complaint, plaintiff was required to meet a much higher burden of proof than that in the normal civil case. The basic rules applicable to a claim such as plaintiff's were set forth in *Shapiro* v. *Rubens,* 166 F.2d 659, 666 (7th Cir. 1948):

> "The burden of proof to establish a constructive trust was upon plaintiff by such clear and convincing evidence as leaves the mind well satisfied that such a trust existed. The proof must be clear, convincing, and so strong as to lead to but one conclusion, or as was said in *Edmundson* v. *Friedell,* 199 Ind. 582, 591, 159 N.E. 428, 431: 'To establish a constructive trust by parol, the evidence must be convincing, and to be convincing, it must be full and clear. It must be such as to be beyond the ordinary rules of preponderance of evidence.' And as was said in the case of *Russell* v. *Jones,* 5 Cir., 135 F. 929, 942: '"Claims of this nature against dead men's estates, resting entirely in parol, based largely upon loose declarations, * * * and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice being done."'"

See *Appelbaum* v. *Appelbaum,* 84 N.Y.S.2d 505, 508 (1948); *In Re Phillips' Estate,* 12 Misc.2d 402, 176 N.Y.S.2d 918 (1958); *Lyon* v. *Smith,* 142 App.Div. 186, 126 N.Y.S. 994 (3d Dept. 1911); *Lundy* v. *Murtash,* 141 N.Y.S.2d 247, 249, appeal dismissed, 143 N.Y.S.2d 820 (4th Dept. 1955); *Merker* v. *Merker,* 26 Misc.2d 362, 204 N.Y.S.2d 355 (1960).

The fact that Mrs. Dwyer was the secretary to a lawyer who gave legal advice to plaintiff did not relieve plaintiff of his burden to prove fraud by clear and convincing evidence. While it is true that the burden of proof of fraud is somewhat relaxed where an attorney overreaches in his dealings with a client and thereby secures personal benefits, there was no evidence here that Mr. Hall, Sr. personally benefited in this transaction. See generally, *Scott on Trusts,* Vol. V, § 495, p. 3533 (3d ed. 1967). As Judge Knapp observed, Mrs. Dwyer's ultimate testamentary disposition of the property was consistent with her high regard for Mr. Hall and his family and her gratitude to him (A. 893a).

Moreover, even if the gift had been made to Hall, Sr., plaintiff would still have the burden of proving the gift was a result of undue influence by the lawyer. The New York Court of Appeals, in ruling on a claim of undue influence by a lawyer who received a bequest from a client, stated:

> "In the absence of any explanation, a jury may be justified in drawing the inference of undue influence, *although the burden of proving it never shifts from the contestant.*" *In Re Putnam's Will,* 257 N.Y. 140, 143, 177 N.E. 399, 400 (1931) (Emphasis added.)

See also, *In Re Wharton's Will,* 270 App.Div. 670, 62 N.Y.S. 2d 169 (1st Dept. 1946), *aff'd,* 297 N.Y. 671, 76 N.E. 2d 328 (1947).*

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* *In re Bartel's Will,* 33 A.D.2d 987, 307 N.Y.S.2d 260 (4th Dept. 1970), and *Howland* v. *Smith,* 9 A.D.2d 197, 193 N.Y.S.2d 140 (3d Dept. 1959), appealed dismissed, 199 N.Y.S.2d 495 (1960), cited by the court below are not to the contrary. Each of those cases involved transactions where a conveyance of property was made to a lawyer by an elderly client without any written evidence to support the claim of a gift. In those cases the court found the evidence was not sufficient to sustain the burden on the recipient of the property to support the claim that a gift had, in fact, been made.

The mere fact that an attorney-client relationship may have existed between Schmieder and Mr. Hall, Sr. did not relieve plaintiff of the burden of introducing probative evidence to overcome the presumption that Mr. Hall, Sr. acted honestly and in good faith. See, *McDonald* v. *Robertson,* 104 F.2d 945, 947 (6th Cir. 1939). Indeed, given the tenuous nature of any attorney-client relationship which might have existed, the existence of that relationship did not relieve plaintiff of the heavy burden which is rightfully placed on one who charges another with fraud and perjury. See, *McDonnell* v. *American Leduc Petroleum Ltd.,* 456 F.2d 1170, 1176 (2d Cir. 1972); *Canada Life Assurance Co.* v. *Houston,* 241 F.2d 523, 538 (9th Cir. 1957). Thus, the Court below was amply justified in concluding plaintiff's self-serving testimony was not sufficient to sustain his burden of proof.

Finally, note should be made of plaintiff's apparent claim that, even if the gift to Mrs. Dwyer in 1938 was absolute, he was entitled to have the property returned in 1967 because Mrs. Dwyer had a "normal obligation" to him. New York law on this point is clear. A gift, if absolute at the time made, as the gift to Mrs. Dwyer was, is irrevocable and the donor has no right to its return.* *Weigert* v. *Schlesinger,* 150 App.Div. 765, 135 N.Y.S. 335 (2d Dept. 1912), *aff'd,* 210 N.Y. 573, 104 N.E. 1143 (1914); *Manacher* v. *Sterling National Bank,* 4 Misc.2d 1069, 160 N.Y.S. 2d 220 (City Ct. N.Y. City 1957). To assert that although the gift was absolute the donee was under a moral obligation to return the property is totally contradictory and would mean that every gift, absolute when given, is subject to return upon the donor's demand. See for example, *Pershall* v.

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* Plaintiff's complaint in the action he commenced in January, 1976 stated he was told by Hall, Sr. in 1938 that the transfer of property to Mrs. Dwyer would have to be "absolute, irrevocable and without imposition of any obligation on the donee" (A. 1019a-1020a).

Elliot, 249 N.Y. 183, 163 N.E. 554 (1928), and *Parsons* v. *Teller*, 188 N.Y. 318 (1907), holding that whatever moral obligations a donee of a substantial gift may feel for the donor, it is not a sufficient basis for a court to compel a return of the gift.

Since plaintiff failed to prove that he was the victim of a fraud or that the gift to Mrs. Dwyer in 1938 was anything other than an absolute and irrevocable transfer, the court below acted properly in ordering the dismissal of the original complaint and in denying plaintiff's various post-trial motions. When plaintiff thereafter commenced a second action seeking to impose a trust on the same property, Judge Knapp properly concluded the new action should be dismissed on the grounds of *res judicata*. *Baltimore Steamship Co.* v. *Phillips*, 274 U.S. 316 (1927); *Walcott* v. *Hutchins*, 280 F.Supp. 559 (S.D.N.Y. 1968), *aff'd*, 404 F.2d 937 (2d Cir. 1969); *Mendez* v. *Bowie*, 118 F.2d 435 (1st Cir.), *cert. denied*, 314 U.S. 639 (1941).*

POINT II

The vesting order of the Attorney General terminated every interest of plaintiff-appellant in the subject property.

On December 15, 1948, the Office of Alien Property filed vesting order 12528 entitled "Stock Owned by and Debts Owing to Kurt Schmieder". That order listed various securities in Mrs. Dwyer's name which were traceable to

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* In dismissing the second complaint Judge Knapp also noted:

> "Insofar as it is arguable that the prior litigation did not encompass plaintiff's novel theory that—at some time after the vesting order—a new duty arose in Mrs. Dwyer which was totally unrelated to her receipt of assets from plaintiff, I dismiss that claim as frivolous." (A. 1082a)

the gift from Mrs. Bochmann* and stated the described property

> "is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by Kurt Schmieder, the aforesaid national of a designated enemy country (Germany);"

The order concluded:

> "THERE IS HEREBY VESTED in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." (E. 1-2).**

Subsequent to the vesting of this property by the Attorney General, Mrs. Dwyer brought suit for the return of the property to her on the ground that Schmieder did not have any interest in the property. The lawsuit was settled pursuant to a stipulation which provided that 55% of the total value of all securities seized would be returned to Mrs. Dwyer and that "the Attorney General will deliver to plaintiff in proper form for transfer of record to plaintiff" specific securities listed therein (E. 15-18).

The statute pursuant to which the Attorney General vested Schmieder's entire interest in the property held by Mr. Dwyer provides that in regard to seized property, the

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* In his brief Schmieder claims he is an "alien friend" (Br. p. 31) and suggests he has some right, under the Trading with the Enemy Act, to the return of property seized from him. In this regard it is important to note that the property which Schmieder kept in his own name in this country was also seized by the Alien Property Custodian. In 1949 Schmieder filed a claim for the return of that property but his claim was rejected (E. 159-161, 202).

** The original vesting order was subsequently amended, but only to the extent of changing the description of the securities vested (E. 3-4).

Alien Property Custodian may "exercise any rights or power which may be or become appurtenant thereto or to the ownership thereof in like manner *as though he were the absolute* owner thereof" (Emphasis added). (Trading with the Enemy Act, 50 U.S.C. App. § 12). The Supreme Court has held that under the clear language of this statute "alien enemy owners were divested of every right in respect of the money and property seized and held by the Custodian . . ." *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120 (1937), and cases cited therein. See also, *Balkan Nat'l Insurance Co.* v. *Commissioner*, 101 F.2d 75, 77 (2d Cir. 1939); *Societe Suisse* v. *Cummings*, 99 F.2d 387, 395 (D.C. Cir. 1938), *cert. denied sub nom. Societe Suisse* v. *Murphy*, 306 U.S. 631 (1939); *United States* v. *Silliman*, 65 F.Supp. 665, 673 (D.N.J.), reversed on other grounds, 167 F.2d 607 (3rd Cir.), *cert. denied*, 335 U.S. 825 (1948); *United States* v. *Borax Control*, 62 F.Supp. 220, 222-223 (N.D. Cal. 1945).

Even if plaintiff Schmieder retained a beneficial interest in the property when it was conveyed to Mrs. Dwyer in 1938, that interest was totally extinguished when the property vested in the Attorney General. The Court expressed the point succinctly in *United States* v. *Borax Control*, *supra* at 223:

> "The Alien Property Custodian, therefore, may now be said to hold full and complete title to enemy property in behalf of the United States, *without any beneficial interest remaining in the former owner.* He may deal with such property, including the selling of it, in any manner appropriate to the interests of the United States." (Emphasis added).

Thus, the United States Government had the unfettered right to dispose of any interest Schmieder had in the property. Since the claim that the Government was finally settling when it reconveyed the property to Mrs. Dwyer was a claim that Schmieder retained some beneficial inter-

est in that property, it is clear that the very interest which Schmieder here asserts is the one which the Alien Property Custodian seized by the vesting order and finally disposed of in the settlement with Mrs. Dwyer.

The cases have held uniformly that the divested alien has no rights against the subsequent transferee from the United States Government of seized property. Thus, in *Munich Reinsurance Company* v. *First Reinsurance Company*, 6 F.2d 742 (2d Cir.), appeal dismissed, 273 U.S. 666 (1927), the Alien Property Office, under the Trading with the Enemy Act, seized stock in the defendant corporation which was owned by plaintiff, a German corporation. Thereafter Alien Property transferred that stock to certain United States citizens. Defendant corporation asserted a claim of some $50,000 against the German corporation which the Alien Property Custodian paid out of the seized property. Suit was brought by the German corporation for a return of the money paid by the Alien Property Custodian from the plaintiff's seized assets. The Court stated at p. 747:

> "This complainant, at the time the Custodian seized and sold its shares of stock in the defendant company, was in our opinion, divested of all right, title or interest in the property, and in the proceeds realized by the subsequent sale of the property. It could not thereafter reclaim the property from the person to whom it was sold. It had no right to or interest in the proceeds of the sale, and no right to reclaim any portion thereof which the Custodian paid over to a third person in settlement of a claim which such person had against the enemy."

And at p. 751:

> "From the time the stock was seized and taken into the Custodian's possession, the title to the stock passed to the Custodian, and when the latter, as owner, sold it, the proceeds of the sale passed to the Custodian,

> as trustee for the United States, to be dealt with as the United States, as owner, might determine. The complainant could not reclaim the stock from the purchaser. Neither could it reclaim the proceeds of the sale."

See also, *Mutzenbecher* v. *Ballard,* 16 F.2d 173 (S.D.N.Y.), *aff'd,* 16 F.2d 174 (2d Cir. 1926), *cert. denied,* 273 U.S. 766 (1926).

Similarly, in *Junkers* v. *Chemical Foundation, Inc.,* 287 Fed. 597 (S.D.N.Y. 1922), defendant was the transferee without consideration of a patent seized by the Alien Property Custodian. The complaint by the former owner, an enemy national who sought return of the patent, was dismissed, the Court stating at p. 600:

> "After seizure, however, the original owner had no title, legal or equitable, which he could assert."

Thus the court below correctly concluded that plaintiff lacked standing to maintain a cause of action against Mrs. Dwyer's estate for the return of the securities she received in 1938 because all his rights and interests in them were vested by the Attorney General in 1948.

CONCLUSION

The judgments of the court below dismissing each of the complaints herein and the order denying plaintiff's Rule 60(b) motion should be affirmed.

Respectfully submitted

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